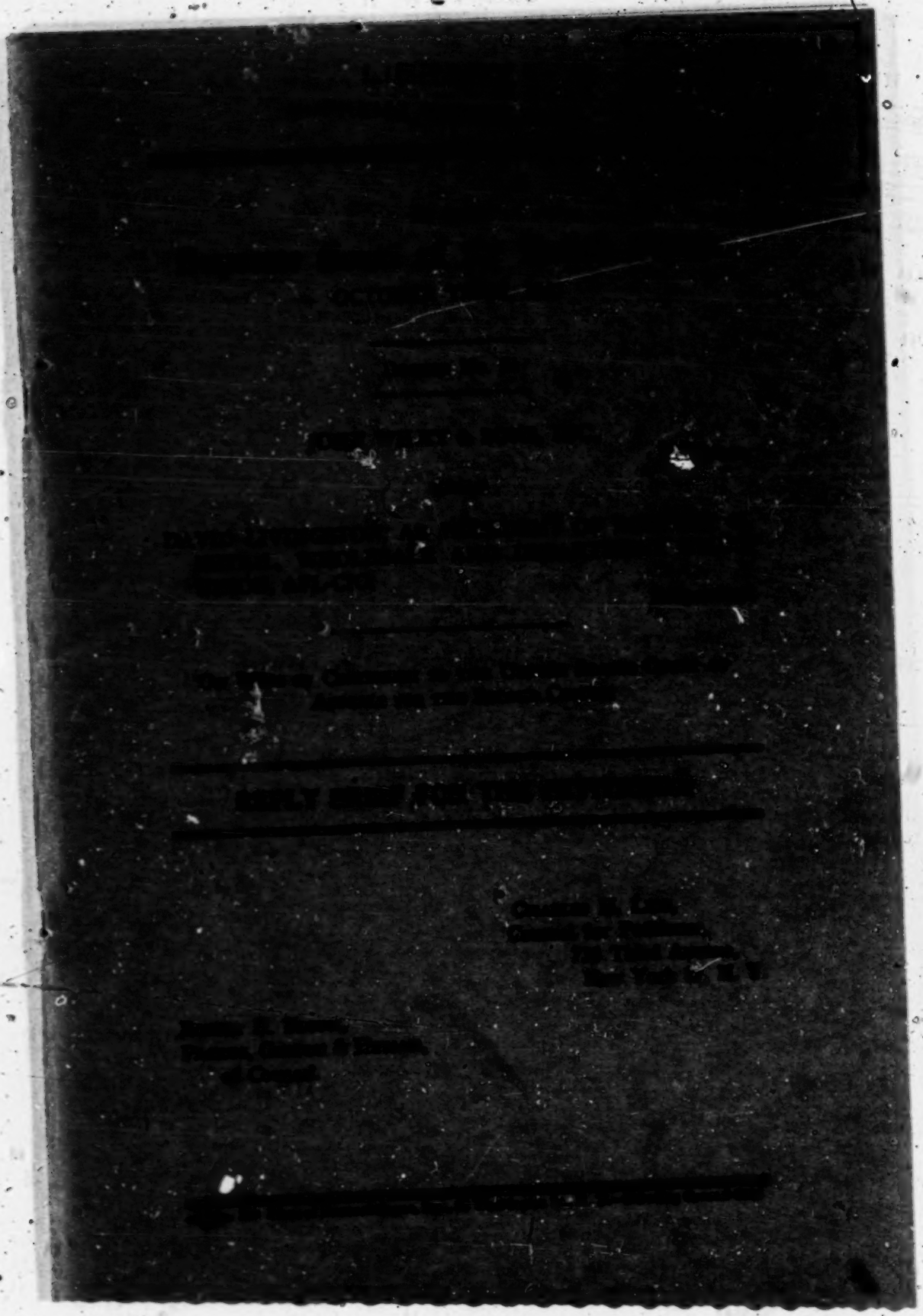

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CASES

STATUTES

TEXT AND ARTICLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

DOCKET NO. 91

JOHN WILEY & SONS, INC.,

Petitioner.

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Introduction

We submit this Reply to the briefs of the respondent (hereafter the "Union") and of the AFL-CIO (hereafter "Amicus"). We think we have adequately met most of the Union's points in our own brief, and for that reason will add little in reply to what has already been said.

The brief filed by Amicus requires more critical attention, if only because in looking "out of the corner of one eye at similar, but different situations than the one actually presented here" (Amicus Br., p. 4), Amicus devotes much of its effort and argument and directs many

of its conclusions to situations which are in fact quite dissimilar to the one before the Court.

Amicus finds only two questions worthy of serious discussion. The first is whether Wiley "is bound by the agreement which the union seeks to enforce" (Amicus Br., p. 2). The second is whether, if it is bound by the agreement, "the court or an arbitrator should decide whether the union failed to comply with [the] procedural steps, and whether the effect of such non-compliance is forfeiture of its claim" (Amicus Br., p. 3).

We do not agree with Amicus' statement of issues. We think the two questions it poses are not proper statements of the questions really presented here.

The error in the first question is that it is too broadly stated. The question is not whether Wiley is generally "bound by the agreement" but whether Wiley is required to arbitrate under that agreement.

There is a double error in the second question. The question assumes a mere "deviation" by the Union (Amicus Br., p. 44) from prescribed grievance procedures. In fact, there was never an initiation of the grievance procedure. No grievance was ever framed for arbitration; no demand for arbitration was ever made. It also assumes that unless the Union can arbitrate the claims, the employees will forfeit their rights (Amicus Br., pp. 3, 44), which is not necessarily so,* and more important is not an issue in this case.

From our view of the case, apart from a preliminary question, there are four, and not two, questions which require decision.

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* The rights of employees in *Zdanok* v. *Glidden*, 288 F. 2d 99 (2d Cir. 1961), upon which the Union so heavily relies, were asserted and recognized in a court proceeding commenced by employees, the New York court having earlier dismissed a union effort to require that they be arbitrated. We do not concede that there are any such rights here, but we do not reach that question.

The preliminary question arises in connection with the erroneous direction by the Court of Appeals that Wiley arbitrate whether it is obligated to arbitrate the substantive questions raised by the Union. Neither the Union nor Amicus justifies such a direction. Amicus in effect concedes the error and asks this Court to make the determination instead. The Union denies that the Court of Appeals made the erroneous direction. But the direction was made, and unless this Court decides the issue on its merits, the decision of the Court of Appeals, if only for that reason, must be reversed.

The basic issues, those involving open questions of federal labor law and policy, are as follows:

1. Whether the Interscience obligation to arbitrate with the Union is binding on Wiley, Wiley not having assumed the contract and the contract not purporting to bind successors, where Interscience merged into Wiley and as a proximate result of that merger the business and work force of Interscience was combined with that of Wiley, and the Interscience industrial community was dissolved.

2. Whether in any event the Union, no longer the employees' collective bargaining representative, may in their behalf attempt to enforce by arbitration the collective bargaining agreement—particularly where the claims it asserts relate to working conditions in a different bargaining unit.

3. Whether the claims to permanent economic benefits and job protections in the Wiley enterprise have any root or foundation in the Interscience contract and are arbitrable thereunder; and finally

4. Whether arbitration may be directed where prior to suit no demand for arbitration was ever made and no other condition precedent to arbitration was complied with.

POINT I

The preliminary question concerning the direction that Wiley arbitrate whether it is required to arbitrate the substantive questions raised by the Union.

Both Union and Amicus concede, as argued by us in Point I of our brief, that the court and not the arbitrator must determine whether the obligation to arbitrate the substantive questions raised by the Union survived the consolidation and became binding on Wiley.

The difference in their position is that in the face of the clear direction by the Court of Appeals that this question be referred to arbitration, the Union stoutly maintains that the Court *did* determine that Wiley was required to arbitrate the substantive questions, whereas Amicus, preferring to overlook the error, asks that this Court itself determine that Wiley is responsible to arbitrate the substantive questions.

The Union says that the Court of Appeals "clearly and unequivocally" held that Wiley was obligated to arbitrate the issues tendered by the Union and that that Court "did not refer that question to arbitration" (Res. Br., p. 15).*

It quotes, but apparently misunderstands, this statement by Judge Medina:

> "We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in

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* Elsewhere in its brief, the Union appears to recede from this position when it says that "Of course, all these contentions [with respect to whether a successor employer must assume the predecessor's obligations to the union] may be advanced before the Arbitrator and a real record made of the underlying facts as to appropriate bargaining unit" (Res. Br., p. 19).

> collective bargaining agreement, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract." (R. 94)

but refrains from quoting from the immediately following paragraph:

> ". . . [W]e think and hold, in the exercise of our duty to fashion an appropriate rule of federal labor law, that it is not too much to expect and require that this employer proceed to arbitration with the representatives of the Union to determine whether the obligation to arbitrate regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, what employee rights, if any, survived the consolidation." (R. 94-95)

The Union summarily disposes of the concurring opinion by Judge Kaufman by saying that it "cannot be interpreted in any way contrary to [the Union's view of] the Court's opinion". Thus, the Union concludes: "the concurring opinion must be found to hold that the Union may proceed to arbitration against Wiley under the contract" (Res. Br., p. 17). This requires considerable skill at legerdemain in the face of Judge Kaufman's opinion (R. 110-111).

The Union's insistence that the court below decided the issue of Wiley's obligation to arbitrate the substantive issues is obviously not well taken. We join in the suggestion made by Amicus that this Court decide the question, rather than remand for further consideration by the Court of Appeals. We think that on the record before it this Court, on any one of several grounds, may reverse and direct the affirmance of the decision of the District Court

dismissing the proceeding, without sending the case back to the District Court for trial. However, if this is not done, the decision of the court below must still be reversed and, for the reasons hereafter stated, the case sent back for trial.

POINT II

Wiley is not obliged to arbitrate with the Union.

A. The Union's Position

Although Wiley was not a party to, and expressly refused to recognize or assume the Interscience contract, the Union relies upon Section 90 of the New York Stock Corporation Law to justify the imposition of an obligation to arbitrate on Wiley (Resp. Br., pp. 17-18). The Union argues that since collective bargaining agreements have for various purposes been held to be "contracts", a collective bargaining agreement is necessarily within the scope of a state merger statute, the literal language of which reaches "all liabilities and obligations". The Union cites no cases to support this view.

Section 90, entitled "The Rights of Creditors", was clearly not intended to deal with the problems of federal law involved in the determination of whether a collective bargaining agreement of an employer engaged in interstate commerce, and in particular the arbitration provisions of such an agreement, are to bind the surviving or consolidated corporation in a statutory merger or consolidation.

The Court of Appeals as well as Amicus agree that Section 90 can not be held to govern. Although the federal courts may resort to and absorb state law in laying down the federal common law for purposes of Section 301 actions,* the application of state merger statutes to the

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* *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957).

problem of whether a "successor" employer should be compelled to arbitrate under its predecessor's contract would not be appropriate. This problem requires a uniform rule, determined by the federal courts and not the various state legislatures, applicable to similar economic situations, without regard to variations in state corporate law, or to legal technicalities not affecting the substance of the transaction.** As stated by Amicus, the application of Section 90 would tend to lead to "wholly incongruous results" (Amicus Br., p. 5).

B. The Positions of Wiley and Amicus

Since Section 90 is not to be regarded as controlling, both Wiley and Amicus recognize the need under the doctrine of *Lincoln Mills* to frame a rule of law to determine whether and under what circumstances a surviving corporation in a merger may be obligated under the arbitration provisions of a collective bargaining agreement between the merged corporation and a union which does not by its terms bind successors and which is not assumed by the surviving corporation.

It will be helpful to summarize our position, the position of Amicus, and the errors we find in Amicus' application to the facts of this case of the rule it urges.

Wiley's Position

1. The collective bargaining agreement between the Union and Interscience did not purport to bind successors, either generally or with respect to the obligation to arbitrate. Wiley expressly refused to recognize or assume the agreement.

2. In the absence of a successor clause or an express or implied assumption, the federal courts should not impose the obligation to arbitrate upon Wiley unless, despite the

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** Cf. *Local 174, Teamsters* v. *Lucas Flour*, 369 U. S. 95 (1962).

merger, the Interscience "employing enterprise" and collective bargaining unit (referred to collectively by Amicus as the "industrial community"—a convenient term which we adopt) retain their separate identity and continue in existence, and the Union remains as the unit's bargaining agent.

3. The merger was accompanied by an integration of the Interscience unit into the larger Wiley unit, with the resulting disappearance of the Interscience industrial community.

4. The record either establishes the disappearance of the Interscience industrial community, in which case the dismissal by the District Court should be affirmed, or at least there is a bona fide dispute as to this material fact and the summary judgment directing arbitration should therefore be reversed.

Amicus' Position

Amicus' conclusion that Wiley is required to arbitrate with the Union is based on the following syllogism:

> 1. Common law principles of contract to the contrary notwithstanding, because of the peculiar nature of a collective bargaining agreement, such an agreement should be held to continue to regulate the industrial community for which it was designed, and to bind a purchaser or other new owner of the business if, despite the change in ownership, the community "remain[s] substantially intact", but not if "the change in ownership has been accompanied by so many other changes in the nature of the enterprise that the industrial community cannot be said to have survived." (Amicus Br., p. 13)

2. On the date of the merger there was no change in the industrial community. "On that date Interscience disappeared as a corporate entity and Wiley succeeded to ownership of the industrial enterprise formerly conducted by Interscience at 250 Park Avenue. So far as the record discloses, that is all that happened". "For at least some period of time after October 2, 1961 there was no physical change at Interscience * * *." (Amicus Br., pp. 17, 18)

3. *Therefore,* (a) Wiley on the date of the merger became "bound to" the Interscience contract, and (b) when "the subsequent physical consolidation" occurred, Wiley, having become so bound, remained obligated to arbitrate with the Union. (Amicus Br., pp. 19, 20)

Errors in Amicus' Assumptions and Conclusions

Error No. 1: That "so far as the record discloses" there was no change in the industrial community on the date of the merger. This is erroneous. The record does indicate a substantial change in the industrial community on the date of the merger.

A more fundamental error occurs in Amicus' failure to recognize that since the Union sought, obtained and now must support summary judgment, Wiley need only show that there is a disputed material question of fact as to whether the industrial community survived to justify reversal.

Error No. 2: That the total termination of the industrial community must occur on "the *date*" of the merger instead of as a *proximate result* of the merger in order for the successor not to be bound under the contract.

Error No. 3: That if Wiley became "bound to" the contract it necessarily follows that it became bound to arbitrate with the Union under the contract.

C. Discussion of Errors in Amicus' Argument

1. *The survival of the industrial community is at least a disputed question of fact.* Essentially, Amicus urges the adoption of the rule suggested by us in our principal brief under subpoint A, Point II, at pages 25 and following, and restated by Amicus at page 13, that whether Wiley can be bound by the obligation to arbitrate contained in the Interscience collective bargaining agreement turns on whether the "industrial community has remained substantially intact, or whether the change in ownership has been accompanied by so many other changes in the nature of the enterprise that the industrial community cannot be said to have survived" (Amicus Br., p. 13).

The Union sought a summary disposition in the District Court based solely upon the pleadings and affidavits. The procedure, invoked by the Union, over the objection of Wiley,* was termed by the Union a proceeding "in the nature of a motion for summary judgment" under Rule 56(a) of the Federal Rules of Civil Procedure (See Pet. Br., n. 1 at p. 4). Accordingly, if there is at least a bona fide dispute as to whether the industrial community survived the merger, the order granting the motion must be reversed. Wiley was not required, as Amicus suggests, to establish in its papers that the industrial community did

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* In our brief to the District Court, we stated, at page 13:

"If the Union asserts a right to arbitration, it must do so in a plenary suit in which the defendant will have the usual procedural safeguards attendant upon an action in the federal courts. These include an opportunity to develop facts in issue through customary discovery procedures, and an adequate opportunity to prepare for and to proceed to trial on the issues involved."

not survive. The burden was upon the Union to establish clearly and beyond any doubt that it *did* survive.*

Wiley has consistently maintained that the integration of the Interscience and Wiley units and the consequent disappearance and termination of the Interscience industrial community occurred at the time of the merger. This position was taken before the District Court, before the Court of Appeals, and on petition for certiorari. The fact that there was an integration of the two units at the time of the merger was never challenged by the Union in either of the courts below, or in its response to the petition for certiorari.

As Amicus concedes, the Court of Appeals decided the case on the "factual assumption" that the integration of the two units accompanied the merger (Amicus Br., n. 7 at p. 18). The assumption was not induced, as Amicus suggests, by our conceptually confusing argument, but because such an assumption was clearly warranted, both by the record and by the Union's failure to dispute the facts

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* Fed. Rules Civ. Proc., 56(c); 6 Moore, Federal Practice ¶ 56.16[3] (2d ed. 1956). Professor Moore states:

> "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. And the papers supporting movant's position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden." (pp. 2123-26; footnotes omitted)

as stated by Wiley in its briefs and oral argument to that court.*

The Union, in the courts below, as it does here, rested upon its contention that Section 90—regardless of the survival or disappearance of the industrial community—required Wiley to arbitrate with it. Under its theory, the survival of the industrial community was not a material fact.

The Union has fallen far short of establishing that the Interscience industrial community *survived* the merger. We think the record adequately shows that the industrial community did *not* survive the merger. Viewed most favorably to the Union the record establishes a contested issue as to whether the integration occurred and the industrial community disappeared on the *date* of the merger. But as we point out in the following discussion, the record is clear that the industrial community was dissolved as a *proximate result* of the merger.

2. *The termination of the industrial community need not occur at the instant of merger.* Although Wiley is accused by Amicus of conceptual confusion (Amicus Br.,

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* Letters, written contemporaneously with the merger and never answered or challenged by the Union, stated that the Interscience unit was integrated into the larger Wiley unit at the time of the merger and that it thereupon lost its separate identity (R. 78-80). No effort was made by the Union from and after the date of merger to maintain shop stewards, bulletin board, hiring hall, check-off or other union prerogatives (R. 82). The Union's complaint alleges that "after the said consolidation, the job conditions of the former Interscience employees were changed and made more burdensome" (R. 10); that the jobs were "terminated" by Wiley and that it refuses "to continue" them (R. 9). The Union's Turbane affidavit complains of resignations due to changed jobs at Wiley (R. 66). Although it is dated March 3, 1962, the Turbane affidavit shows that nine of the eleven resignations took place before January 24, 1962, the date of the Union's Rozen affidavit which lists 31

footnote continued on next page

p. 17) it is Amicus who falls into that error as a result of its effort to avert the consequences to the Union of an application to the facts of this case of the rule it urges.

This is dramatized by the absurd result to which Amicus' argument leads. If the physical integration occurs on the date of the merger the surviving corporation would not be bound by the contract. However, if the physical integration occurs a day later, the surviving corporation would be fully bound by the contract, liable to all claims which had arisen or might thereafter arise thereunder, and required to arbitrate all such claims with the union. It is difficult to believe that such drastic consequences should turn upon such a rigid and illogical distinction.

Amicus states, on pages 17 and 18, that "the question as to whether Wiley is bound by the agreement is posed by the merger, and by the merger only. The physical integration of the two plants gives rise to . . . questions as to what the agreement means, not questions as to who is bound by the agreement." It conceptually confuses the manner by which the change is made with the effect on the industrial community of such a change.

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footnote continued from preceding page

employees (R. 49, 50) as compared with the forty employed by Interscience at the date of the merger (R. 6).

Amicus also errs in suggesting that the Court look only at the physical activities of the employees and the location in which they are performed. This is only one factor in determining whether the industrial community has survived. For example, the Court of Appeals for the Fifth Circuit has stated, in *N.L.R.B.* v. *Alamo White Truck Service, Inc.*, 273 F. 2d 238, 242 (1959), that it regards "the employee-employer relationship as a most important element in determining whether there is sufficient continuity between two employing enterprises . . . ." and pointed to the "difference between the close personal relationship of management and workers characteristic of a small, local business . . . and the disembodied relationship of workers to top management not uncharacteristic of a large corporation . . . ." Amicus concedes that on the date of merger there was a change of management (Amicus Br., p. 17).

Admittedly, the merger standing alone does not terminate the industrial community. We have never contended that it does. Amicus says that there is no "litmus paper test" to determine whether the industrial community has survived. "Each case must be decided by an examination of all the facts and circumstances" (Amicus Br., p. 13). We agree.

But clearly, under the rule urged by Amicus it is the *proximate consequences* to the industrial community resulting from a change of ownership (whether by purchase or merger) that must determine a successor's obligation, and not the manner by which the ownership is changed. And clearly, too, the determination of that question requires an examination by the court and not the arbitrator, of the facts and circumstances, not at the precise instant of merger or other change of ownership, but over a reasonable period of time.*

In this case the integration of the two units began immediately and was completed as planned within a short period of time.** A successor should be allowed to proceed in an orderly fashion to terminate the acquired industrial community without subjecting itself to the obligation to arbitrate far-reaching claims with a union with which it has no obligation to bargain.

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* Amicus erroneously equates a merger to a purchase of stock (Amicus Br., p. 15). A merger is more akin to a purchase of the assets of the merged company in consideration for the stock of the purchaser. Although in this case the state merger statutes were utilized, the same result could have been achieved by Wiley purchasing the assets of Interscience in consideration for its voting stock. The federal income tax law makes no distinction between these two forms of acquisitions for purposes of nonrecognition of gain. See I.R.C. § 368(a)(1)(A), (C). The law—both in the courts and before the NLRB—is settled that a purchaser (absent an express assumption) is not obligated by the labor contract of the vendor. (Some of the cases are collected by Amicus at n. 1, p. 8, and n. 5, p. 14). While we have not relied on the factual similarity to the asset-purchase cases, the Court might well accept that rule and apply it here.

** See note, *supra*, at page 12.

The National Labor Relations Board in determining whether the industrial community has survived a merger clearly rejects Amicus' "date of the merger" rule. For example, in *Hooker Electrochemical Co.*, 116 N.L.R.B. 1393 (1956), the Board held that where following a merger, the operations of the two units were integrated in an orderly manner, the existence of a contract with the merged unit would not bar a representation petition. The Board noted:

> "Integration has already been achieved to a substantial degree and will be complete according to a precise schedule within the next month or two. We must necessarily conclude that the consolidated operations are comparable to an entirely new operation. . . ." (p. 1396)

See also, *American Concrete Pipe, Inc.*, 128 NLRB 720 (1960); *L. B. Spear & Co.*, 106 NLRB 687 (1953); *Chance Vought Corp.*, CCH NLRB Decs. ¶ 10,945 (1962).

3. *Whether Wiley became "bound to" the contract is not necessarily decisive of whether Wiley became bound to arbitrate with the Union.* Amicus also errs in assuming that if the Interscience *employees* have any claims against Wiley, an issue with which we are not concerned here, it necessarily follows that the *Union* has the right to assert those claims.

This is a *non sequitur*. It overlooks Amicus' own argument that a collective bargaining agreement is a kind of code establishing the rules under which the industrial community is to be governed (Amicus Br., pp. 6, 7); that "in order to determine who is bound by that code, and under what circumstances, it is necessary therefore to look not to the law of contracts, but to the principles and policies of the federal labor law" (Amicus Br., p. 8). The same must also be true in determining who may enforce the "code".

There are three parties to the code: employer, employees and union, and provided the industrial community continues, *one* party may move out from, or enter the community, without affecting the relationship between the *other* parties.

Amicus applies this argument to a new owner of a business who *enters* the community by purchase or other manner of change in ownership, but it stops short of applying it to a union who *leaves* the community because it no longer represents the collective bargaining unit of employees.

As Amicus concedes, "the question of whether the Union's representative status survives a change in ownership is [not] exactly the same question as whether an existing collective bargaining agreement survives" (Amicus Br., n. 6 at pp. 14-15).* This distinction between the rights of a union negotiating an agreement to enforce it and the rights of the employees derived thereunder was recognized and noted in *Procter and Gamble*** and *Montgomery Ward*,*** to which we refer in our principal brief.

In *Procter and Gamble*, Judge Hays noted this distinction, stating:

> "The right to arbitrate under a collective agreement is not ordinarily a right incident to the employer-employee relationship, but one which is incident to the relationship between employer and union." (p. 184)

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* Amicus' position nevertheless appears to be that a union's loss of representative status would not disqualify it from enforcing a collective bargaining agreement. This is contrary to the law, as we shall hereafter show, as it has developed in the federal courts and before the NLRB.

** *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 312 F. (2) 181 (2d Cir. 1962), cert. den. 374 U. S. 830 (1963), discussed at pp. 40-41 of our principal brief.

*** *Retail Clerks* v. *Montgomery Ward & Co.*, 316 F. 2d 754 (7th Cir. 1963), discussed pp. 46-48 of our principal brief.

This distinction was again emphasized in *Montgomery Ward* where the Court denied the right of decertified unions to sue under collective bargaining agreements and said:

> ". . . the plaintiff unions contend here that the main purpose of this law suit is to enforce contract terms beneficial to the employees, such as those terms relating to wages, vacations and seniority. We do not reach the question of whether the employees (or some later certified bargaining representative) may enforce such provisions of these contracts."

The consequences of this distinction will be discussed in our next point.

POINT III

The Union is not the proper party to enforce any rights which the Interscience employees may have against Wiley.

Amicus devotes one paragraph to Wiley's argument that the Union is not the proper party to enforce the alleged rights of the former Interscience employees because it has lost its status as collective bargaining agent as a result of the merger. Amicus argues that the Union is not asking the court to give it the status of exclusive bargaining representative but is merely seeking to enforce a contract to which it is a signatory and in whose favor the obligation to arbitrate runs.

This attitude of reading the collective bargaining agreement as a commerical contract can hardly be reconciled with its earlier attack on the strict application of the "privity of contract" doctrine to such an agreement. Since Amicus asserts that a new owner who has neither signed nor assumed a collective bargaining agreement may become bound by it, if and when he enters a continuing industrial community, surely there should be no conceptional difficulty

in holding that a union who was a signatory to the contract is no longer entitled to enforce it when its relationship to the community which gave rise to the contract terminates.

This is what the courts in effect have held.* Amicus, although it does not discuss these cases, must necessarily argue that they were wrongly decided since in each the union merely sought to enforce a contract which it had negotiated and to which it was the signatory.

No owner, new or old, should be required to recognize, negotiate, settle or arbitrate employees' grievances with a union which is no longer the collective bargaining representative of those employees. To compel that kind of result merely because the law of contracts would require it** would be to subvert the federal labor policy which requires an employer to recognize, bargain with, and if the contract so requires, arbitrate with the chosen collective bargaining agent of the group, and no other.

And that must certainly be true, where, as here, the issues which the Union asks to arbitrate relate to working conditions in the new collective bargaining group which may be represented by another union or which may elect to be represented by no union at all.

Amicus argues that "the question is not whether the new owner is a legal successor for other purposes, but

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* *Retail Clerks* v. *Montgomery Ward & Co.*, 316 F. 2d 754 (7th Cir. 1963); *Glendale Manufacturing Co.* v. *Garment Workers, Local 520*, 283 F. 2d 936 (4th Cir. 1960), cert. den. 366 U. S. 950 (1961); *Modine Manufacturing Co.* v. *Machinists*, 216 F. 2d 326 (6th Cir. 1954); *Kenin* v. *Warner Brothers Pictures, Inc.*, 488 F. Supp. 690 (S.D.N.Y. 1960). A corollary is that a union certified during the term of an existing collective bargaining agreement negotiated by another union is not bound by that agreement and a refusal by the employer to bargain on a new contract is an unfair labor practice. *American Seating Company*, 106 N.L.R.B. 250 (1953); *Ludlow Typograph Company*, 113 N.L.R.B. 724 (1955); see also *Hershey Chocolate Corporation*, 121 N.L.R.B. 901, 909-910 (1958).

** Compare Amicus Br., p. 9.

whether it is the successor for collective bargaining purposes" (Amicus Br., p. 15). It must then, consistently, argue that the question is not whether the union was a signatory to the contract, but whether it remains as the employees' collective bargaining agent under that contract.

The Union takes a different position. It contends that only a determination by the NLRB can deprive the Union of its right to enforce a contract which it has signed. This, of course, is not so. Enforcement of collective bargaining agreements has been entrusted to the courts. The courts must necessarily make any determination upon which enforcement of the contract depends. Here the court must determine whether Wiley is a proper party and need not await a determination by the NLRB of whether Wiley is bound by the contract. The court must also determine whether the Union is a proper party since it is called upon by the Union to enforce the contract.

The fact that similar issues might arise in an NLRB proceeding with respect to an unfair labor practice* or a representation** or decertification proceeding does not limit the scope of judicial inquiry when a court is called upon to enforce a collective bargaining agreement. *Smith* v. *The Evening News Association*, 371 U. S. 195 (1962).

In *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), relied on by the Union, this Court specifically noted at page 595 that although the contract had expired, the Union continued to represent the bargaining unit. We do not contend that the mere expiration of a collective bargaining agreement deprives the Union of authority to represent the employees. Nor do we contend

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* See, e.g., *Administrative Decision of General Counsel*, SR-1880, 50 LRRM 1078, 1962 CCH NLRB ¶ 11,208.

** See e.g., *Hooker Electrochemical*, 116 N.L.R.B. 1393 (1956).

that a mere shut-down of a business terminates the Union's status as bargaining representative. What we do contend is that the integration of the unit into another larger unit terminates the Union's bargaining agency. The decisions of the NLRB clearly support this view. (See cases cited, Pet. Br., p. 45.)

Retail Clerks v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962), cited by both Union and Amicus, is not in point. That case merely holds that § 301 is not limited to suits to enforce negotiated collective bargaining agreements, but also confers jurisdiction upon the federal courts to enforce a "contract" which a labor organization, not acting in a collective bargaining capacity, made with an employer.

The case does not touch the question here presented, whether a union which made a contract as the authorized representative of an appropriate bargaining unit may enforce that contract after it has lost its representative status.

POINT IV

The issues tendered for arbitration are not arbitrable.

Stated baldly, the Union wants to arbitrate whether the Interscience employees are entitled to certain "permanent economic benefits and job protections" which it is claimed they acquired under the Interscience agreement (Amicus Br., p. 3). The claim is made as a result of the merger of Interscience into Wiley, but the issues sought to be arbitrated do not arise out of the merger as such; they arise from the termination of the Interscience employing enterprise, an event which could have occurred in any number of different ways. That Interscience in this case merged into Wiley merely affords Wiley, who was not a party to the Interscience contract and who did not assume the contract, additional defenses to those which Interscience itself would have had.

The rights claimed are that Wiley must "permanently" grant the kind of seniority specified under the expired Interscience contract and the right to accrue additional seniority in the Wiley establishment; that it must commence and permanently continue to make payments into the District 65 Welfare Plans; and that it must permanently recognize the job security and the grievance and arbitration machinery and the severance and vacation pay provisions of the Interscience contract.

Nothing in the Interscience collective bargaining agreement, which expired on January 31, 1962, provides any basis for the assertion of those claims or for the assertion of a right to arbitrate them. The agreement contains no successor clause; it does not contemplate a merger of Interscience into another company, and makes no provision for any dovetailing of seniority in that event.* By its terms it is specifically limited to Interscience's 250 Fifth Avenue location or any branch office thereof thereafter opened by Interscience.

Moreover, as if to remove any possibility that claims such as these might be made, the agreement states that it embodies "the whole agreement of the parties" and that "there are no promises, terms, conditions or obligations" other than those specifically stated (Sec. 30.0, R. 36).

How then does the Union justify its demand to arbitrate them? It does so solely in reliance on the *Steelworkers* cases** as authority for the proposition that because it *says* that these claims arise out of the contract, the court must assume that they do, and that it therefore must refer them to arbitration. This, of course, is tantamount to saying that whenever a party *says* that it is entitled to arbi-

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* The court below said that "neither of the parties had a possible consolidation in mind when the terms of the agreement were negotiated and settled" (R. 93).

** 363 U. S. 564; 363 U. S. 574; 363 U. S. 593 (1960).

trate a claim (by characterizing its claim, no matter how far removed from the contract, as one made under the contract), it has an absolute right to arbitrate, regardless of whether the claim bears any relation to the contract.

This is the exact proposition only recently categorically rejected by the Seventh Circuit in *Independent Petroleum Workers of America, Inc.* v. *American Oil Company* (Nov. 21, 1963; unofficially reported at 48 CCH Lab. Cas. ¶18,600). In that case the court, paraphrasing the union's position, "that the mere allegation that the agreement has been violated, ipso facto, entitles it to arbitration" said that

> "This proposition, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.
>
> "Plaintiff's position is devoid of all logic. It is without merit and we so hold. . . ." (at p. 30,185)

The *Steelworkers* cases in our opinion are not authority for any such doctrine and are distinguishable in at least four respects from the proposition advanced by the Union and supported by Amicus.

1. The grievances in the *Steelworkers* cases were asserted under contract provisions either specifically stated or necessarily implied. No such provision, express or fairly to be implied, is to be found here.

2. The *Steelworkers* agreement to arbitrate was much broader than that involved in this case.

3. The grievances asserted in the *Steelworkers* cases were "grist for the mill" grievances, the kind normally settled at plant level, which certainly is not the case here.

4. The union in the *Steelworkers* cases continued to represent the collective bargaining unit, which here it does not.

We think it important to elaborate these distinctions lest as a result of unthinking reliance on language used in other context, an erroneous doctrine result that *any* claim that the Union makes must be arbitrated if only it expresses the proper passwords, "This is a contract claim".

1. The *Steelworkers* claims were made under specific provisions of the contract, either express or necessarily implied.

The grievance in *American Manufacturing* "concededly involved the application of a *specific provision* of the agreement" (Emphasis supplied). This was the union's statement in that case to this Court* and on these facts, this Court said:

> "The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement." (363 U. S. 569)

In directing arbitration concerning the construction and application of that specific provision of the contract, the Court rejected the Cutler-Hammer doctrine,** in which the court, determining that the grievance was patently without justification although clearly brought under the contract, held that reference to arbitration would be unnecessary and therefore should not be ordered. The

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* Brief for petitioner, *United States Steelworkers of America* v. *American Manufacturing Company;* v. *Warrior & Gulf Navigation Company; and* v. *Enterprise Wheel & Car Corporation*, Nos. 360, 443 and 538, October Term, 1959, hereafter referred to as "Stlwkrs. Union Br.

** *International Assn. of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917 (1947), aff'd. 297 N. Y. 519 (1947).

union claimed that approval of this doctrine would defeat the intention of the parties to arbitrate all disputes arising under "some provision of the agreement, express or implied" (Stlwkrs. Union Br., p. 22), and it was in this context that this Court said that the function of the court

> "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." (363 U. S. 568)

Warrior & Gulf involved a grievance arising out of the contracting out of work. The agreement contained a broad arbitration clause. The union argued the case on the ground that "*The grievance in this case plainly did rest on the contract.*" (Emphasis supplied) (Stlwkrs. Union Br., p. 26). This Court agreed. It did so because it accepted the union's assertion of a contract basis for the claim. It said:

> "Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." (363 U. S. 584)

It also did so because it accepted the union argument that some limitation on contracting out was reasonably to be implied from the agreement as a whole, the agreement containing no provision to the contrary, because otherwise the company would be "free completely to destroy the collective bargaining agreement by contracting out all the work" (Concurring Opinion, 363 U. S. 572).

Thus, on a showing of a consistent practice to arbitrate claims of that sort, and a finding that otherwise the entire contract could be frustrated during its term, the Court read into the contract a limitation on the right to contract out and required that the issue arising under that limitation be arbitrated.

Enterprise, of course, involved a specific provision of the contract, the only question before the court being whether the discharged grievants were entitled to back pay notwithstanding the expiration of the agreement. In affirming the arbitrator's award, this Court adopted the union contention that the award was based "not on the law of contract damages, but on the *language of the agreement*, which *expressly prescribed* that employees unjustly discharged during its term were to be reinstated with back pay" (Emphasis supplied) (Stlwkrs. Union Br., p. 26).

2. The Interscience arbitration clause is much narrower than those involved in the *Steelworkers* cases.

The arbitration clauses in the *Steelworkers* cases were broad and unlimited.

The Interscience arbitration clause on the other hand, is not a broad and unlimited clause. Although the preamble of Section 16.0 (R. 27) is broad, it is limited by clauses, found elsewhere in the contract, that differences arising out of specifically identified provisions of the contract are not to be arbitrated.*

Thus, the Interscience agreement to arbitrate is a limited agreement. Moreover, it contains a specific exclusion clause stating, in substance, "that, in addition to other provisions elsewhere contained in [the] agreement which expressly deny arbitration to specific events, situations or contract provisions," arbitration should not be required of "matters not covered by this agreement" (Sec. 16.5, R. 29). Merger and permanent rights following merger are not covered by the agreement.

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* Sec. 16.8 (R. 29), provides that whenever the right to exercise its sole discretion or judgment is reserved to the employer, its exercise or non-exercise shall not be arbitrable. Provisions covered by this reservation are Sections 6.10 (R. 17); 7.2 (R. 18); 18.0 (R. 31) and 18.2 (R. 32).

3. There is a basic difference between the grievances in the *Steelworkers* cases and the Union's claim in this case.

The grievances in the *Steelworkers* cases were those of a grist for the mill kind, settleable "at plant level" (363 U. S. 596), and they were asserted in behalf of specifically identified grievants. That is certainly not the case here. The claims here are, to say the least, unique; they purport to be made on behalf of employees who remain faceless and unnamed, and their nature is such that they can hardly be settled at "plant level".

4. The Union here is not the collective bargaining agent for the employees for whom it says it speaks. In the *Steelworkers* cases, it was.

The rationale supporting the decisions in the *Steelworkers* cases is that a subsisting collective bargaining agreement is a system of industrial self-government; that the grievance and arbitration machinery is at the very heart of it, and that the processing of even a frivolous claim is likely to have a therapeutic value, helpful to the continuing "working relationship" between the parties (363 U. S. 580, 581). Here, of course, there is no continuing working relationship or continuing employing enterprise. Interscience has disappeared and the Interscience collective bargaining unit has lost its identity. There is no system of industrial self-government to preserve.

The *Steelworkers* cases, then, were conventional grievance cases arising under and during the term of the contract.

Here, on the other hand, arbitration is sought to determine whether Wiley will be liable, after the expiration of the Interscience contract, for the commitments made by Interscience for the life of the contract.

No effort is made to state a contract basis for the claims to post-contract rights. The complaint alleges that Wiley refused to recognize the validity of the contract "currently and *beyond* January 30,* 1962" and that it has refused to recognize the property rights of the Interscience employees "thereunder [that is, under the contract] *and otherwise beyond January 30, 1962*" (R. 5). It alleges that the employees will be seriously affected unless the seniority rights are recognized and protected in accordance with the agreement "*or otherwise*" (R. 6). On this basis the Union asks to arbitrate whether Wiley must accord seniority and other rights "now" (that is, when the complaint was filed, a week before the contract expiration date, a question that is moot) and "*after* January 30, 1962", the contract expiration date. (Emphasis supplied.)

It is clear that the Union does *not* rely on the contract: Instead, it relies on rights "*otherwise*" claimed.

This Court, in the *Steelworkers* cases, could not have intended that claims to permanent rights to employment, compensation and working conditions, so lacking in root or foundation in the contract, can be forced to arbitration under the contract, no matter how broad the contract arbitration clause. Indeed, the excerpt from Professor Cox's article** which this Court quoted with approval in *American Manufacturing* (363 U. S. 568), is immediately followed in the text with the observation which, if it meets with the Court's approval, as we think it must, disposes of the issue.

> "Once this interpretation is put upon the arbitration clause (that the typical arbitration clause constitutes 'a promise to arbitrate every claim, meritori-

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* Respondent's error. The contract expiration date was January 31, 1962.

** Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 261 (1958).

ous or frivolous, which the complainant bases upon the contract') the court's role is limited to determining whether the moving party is *really* basing its claim on the contract or is seeking to have the arbitrator decide according to equity and sound industrial relations. In the latter event *arbitration should be denied.*" (Emphasis supplied, p. 261)

The Union's claims are not "really" based on the contract; they are based on its own notions of equity and industrial relations, built on its own variety of political and economic philosophy.

We think that the principles stated in *System Federation No. 59* v. *Louisiana & A. Ry.*, 119 F. 2d 509 (5th Cir. 1941) remain the law. There it was said:

> "The only question with which we are here concerned is whether the seniority rights claimed, arise out, and exist, because of, the 1929 contract, and persist during and only during its term, or whether they indefinitely continue to exist after it has been abrogated, . . ."
>
> "On this point the authorities are uniform. They settle it that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions." (119 F. 2d 515)

The eminent counsel who argued for the unions in the *Steelworkers* cases agreed with this view, at least at the time they briefed those cases to this Court. In their brief they distinguished *System Federation No. 59* from *Enterprise* on the ground that the violation claimed in the cited case arose *after* the contract had expired, whereas in the *Enterprise* case the grievance had arisen and the claim had

been filed long *before* the agreement expired. In supporting this distinction they said:

> "The court [in *System Federation No. 59*] there held, quite properly, that the senority rights created by the agreement existed only *so long as the agreement existed,* and the employer could not be said to have violated those rights after the agreement expired." (Emphasis supplied) (Stlwkrs. Union Br., p. 77)

We need not argue here the merits of the substantive claim to permanent rights. If they have validity they should be established in a court of law in the same manner that employees sought to establish their rights in the *Glidden** and in the *Oddie*** cases. We need only say that claims such as these can not be established through arbitration, for arbitration is consensual, and it would strain the imagination to suggest that Interscience intended or can fairly be presumed to have intended to submit this kind of claim to arbitration.

POINT V

The effect of the Union's failure to comply with the conditions precedent to arbitration.

We argued before the Court of Appeals that since the obligation to arbitrate is, as declared by this Court, a matter of contract, the Court must determine whether that obligation has been breached. This necessarily requires the court to determine whether the obligation to arbitrate was qualified by conditions precedent, and if so, whether they have been met (See Pet. Br., Point III).

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* *Zdanok* v. *Glidden*, 288 F. 2d 99 (2d Cir. 1961), affd. on another point 370 U. S. 530 (1962).

** *Oddie* v. *Ross Gear & Tool Co.*, 305 F. 2d 143 (6th Cir. 1962), cert. den. 371 U. S. 941 (1962).

The Court of Appeals (on whose opinion on this point the Union here relies) did not meet our argument, but merely held that the effect of a failure to comply with the grievance and arbitration procedure was for the arbitrator's determination. The result was based in part on a misreading* of certain language in *United Steelworkers* v. *American Mfg. Co.* and in part on certain policy considerations. We submit that if this Court does not intend to repudiate its holding that the obligation to arbitrate is contractual, the Court of Appeals' opinion cannot logically stand.

Amicus, in recognition of the inconsistency between the pronouncements of this Court and the reasoning of the Court of Appeals, would reach the same result by a highly artificial *rule of construction*, as distinguished from a rule of law as laid down by the Court of Appeals.

A. Amicus' Proposed Rule of Construction

Amicus' argument is not new. It is no different in principle than the argument, rejected by this Court in the *Steelworkers* cases, that whether a claim is "substantively" arbitrable should be determined by the arbitrator and not by the court. The logic (all questions concerning the "interpretation or application of the agreement are to be arbitrated) as well as the empirical evidence adduced (the large number of arbitration proceedings in which procedural defenses were passed on by an arbitrator) is essentially the same.

Here Amicus argues that the parties "have agreed to commit all questions concerning 'interpretation or application' of the agreement to arbitration," and therefore whether the contractual promise to arbitrate is conditioned upon procedural compliance is for the arbitrator (Amicus

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* Discussed in our principal brief at footnote 38, page 51.

Br., p. 26). The answer to such reasoning has already been given:

> "Since the arbitration clause itself is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator. But the Court rejects the position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary." *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 571 (1960) (Concurring Opinion)

Amicus states that "actual experience demonstrates that parties do, in fact, refer such questions ["procedural arbitrability"] to their arbitrators", pointing to the large number of arbitration decisions in which the issue was raised. It then argues that this reflects the "intentions of the labor-management community" which Amicus invites the Court to read into every collective bargaining agreement (Amicus Br., p. 43). This is also but an echo of the reasons given to further the argument that "substantive arbitrability" should be determined by the arbitrator. See Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 649 (1959). The fact that the parties continue to submit questions of "procedural arbitrability" to the arbitrators even in those circuits where the Court of Appeals has ruled the question to be one for the court is no more significant than the fact that parties throughout the United States continue to raise before the arbitrator questions of "substantive arbitrability" even though this Court has unequivocally held the question to be one for the court. See Smith, "Arbitrators & Arbitrability", *Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators* 75 (1963).

The parties are free, if they both consent, to allow either issue to go to the arbitrator, and as a practical matter, will frequently do so. Whether a consistent practice on

the part of particular parties to do this would constitute the necessary "clear demonstration"* that the parties intend the arbitrator to determine arbitrability need not be decided at this time. However, it is clear that the necessary "clear demonstration" as to both "substantive" and "procedural" arbitrability, is not present merely from the fact that there were and continue to be many arbitration decisions in which the arbitrators pass on questions of arbitrability.

Although it would appear that this Court has clearly foreclosed the argument advanced, Amicus, far from finding any inconsistency between *Steelworkers* and the rule it urges, boldly argues that the famous trilogy actually supports its position. We believe the explanation for this anomaly is as follows:

In *Steelworkers*, this Court laid down two rules. The first, to determine who is to decide arbitrability:

> "Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance, but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a *clear demonstration* of that purpose."** (Emphasis supplied.)

The second, to guide the court or the arbitrator making the decision on arbitrability:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputes."***

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* *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, n. 7 at p. 583 (1960).

** *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, n. 7 at p. 583 (1960).

*** *Id.*, at p. 583.

The basic error in Amicus' argument is that it applies the wrong *Steelworkers* rule, applying the second rule to a question which the first rule was intended to answer.

Wiley asserts that the dispute is not arbitrable because the promise to arbitrate was qualified by conditions that have neither been performed nor excused. The issue raised is simply and solely arbitrability—must Wiley submit the Union's claims to an arbitrator.* The question before this Court is whether the court or the arbitrator should decide this single issue—the arbitrability of the Union's claims.

The answer has already been given by this Court in *Steelworkers* in what we may refer to as the "clear demonstration" or first *Steelworkers* rule. There is no basis for a different answer to the essentially identical question presented in this case. Since the Union has failed to make a clear demonstration of a contrary intent, the issue of arbitrability is for the Court.

And if the *court* in deciding arbitrability is to apply a presumption analogous to the second *Steelworkers* rule, the presumption would have to fall before the express language used by the parties here that "The failure by either party to file the grievance within [the] time limitation shall be . . . deemed to be an abandonment of the grievance" (Sec. 16.6; R. 29).**

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* The issue of arbitrability does not encompass, as Amicus suggests, the question whether the Union should be penalized for procedural breaches if such breaches do not bar arbitrability. This, of course, would be for the arbitrator. Nor does the issue involve whether the Union or the employees might enforce their alleged claims in another type of proceeding.

** Although it may very well be that the second *Steelworkers* rule has no application to the determination of "procedural" as distinguished from "substantive" arbitrability.

B. The Union Abandoned the Arbitration Remedy

The facts of this case do not show a mere procedural defect or deviation as both the Union and Amicus imply. The facts reflect a *total abandonment* by the Union of arbitration and an *election* to rely upon bargaining to gain the benefits sought on behalf of its members. In doing so it obtained substantial benefits for the Interscience employees.*

Even if it is assumed the parties intended that the arbitrator himself would determine whether a procedural defect or deviation destroyed his jurisdiction, there is no justification for presuming that the parties intended to confer on the arbitrator the right to determine arbitrability where the Union never makes a demand for arbitration.

Indeed, we suggest that the failure to *demand* arbitration deprives the court of the jurisdiction it has assumed under Section 301 of the Labor Management Relations Act. Without a prior demand to arbitrate, there can be no refusal, and therefore no showing, required by the Act, of a "violation" of a contract to arbitrate.

C. The District Court correctly Held That the Union Abandoned Its Right to Arbitrate

The Union also argues at length (Resp. Br., pp. 2, 40-50) that even if the court and not the arbitrator is to determine whether, in view of its failure to invoke the grievance and arbitration provisions of the contract, it is entitled to arbitration, the District Court erred in its decision on the merits. Since by this time we are not strangers to the Union's arguments, we believe they have generally been anticipated and dealt with adequately in our principal brief. A few additional comments are in order.

To say that "strict compliance" with procedures set forth in the contract should not be required is to suggest

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* See our principal brief at n. 44, p. 55.

that there was some attempt to invoke the grievance and arbitration provisions of the contract. There was never even the slightest suggestion that the contract procedures were being invoked. If doctrines of waiver or estoppel are to be invoked, they clearly should be applied in favor of Wiley, who was misled by the Union's conduct into granting substantial benefits to the former Interscience employees.

The cases cited by the Union on pages 41 through 48 do not support its argument.*

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* For example, in *River Brand Rice Mills* v. *Latrobe Brewing Company*, 305 N. Y. 36, 110 N. E. 2d 545 (1953) (Resp. Br., p. 41), described by the Union as a "leading case" a New York court had previously held that arbitration of the claim involved was barred because the claimant had failed to demand arbitration within the five day period required by the contract. The Court of Appeals held that the seller could not obtain relief through a lawsuit, even though his remedy by arbitration was foreclosed. The portion of the opinion quoted by the Union was pure *dicta*, and there is nothing in the opinion to cast doubt on the correctness of the previous holding barring arbitration.

Matter of Tuttman, 274 App. Div. 395, 83 N.Y.S. 2d 651 (First Dept. 1948) (Resp. Br., p. 42) involved the standard commercial arbitration clause. The right to demand arbitration was not subject to any express condition precedent or time limitation. Another clause of the contract, unrelated to the arbitration provision, required that any claim that merchandise was defective be made within ten days after delivery. The court correctly held that the ten day provision was not a statute of limitation for instituting arbitration proceedings, but was a matter going to the substance of the party's claim, compliance with which was a matter for the arbitrator to determine. *Matter of Raphael*, 274 App. Div. 625, 626-628 (1st Dept. 1949) (Resp. Br., p. 42); *Barr & Co.* v. *Municipal Housing Authority*, 86 N.Y.S. 2d 765 (Sup. Ct. Westchester Co. 1949), affd. without opinion 276 App. Div. 981 (2nd Dept. 1950); *W. S. Ponton Inc.*, 101 N.Y.S. 2d 609 (Sp. Term N. Y. Co. 1950), affd. 102 N.Y.S. 2d 445 (1st Dept. 1951); and *Application of Roselle Fabrics, Inc.*, 108 N.Y.S. 2d 921 (Sp. Term N. Y. Co. 1951) (all cited in Resp. Br., p. 42), are further examples of the rule in *Tuttman*.

(*footnote continued on following page*)

(*footnote continued from preceding page*)

The following cases cited by the Union deal with whether the court or the arbitrator is to determine arbitrability and are not relevant to the issue for which they are cited: *Insurance Agents* v. *Prudential Insurance Co.*, 122 F. Supp. 869 (1954) (Resp. Br., p. 45); *United Cement Workers* v. *Allentown-Portland Cement Co.*, 163 F. Supp. 816 (1958) (Resp. Br., p. 45); *Local Union 516* v. *Bell Aircraft Corp.*, 283 App. Div. 180 (4th Dept. 1954) (Resp. Br., p. 42); *Roto Supply Sales Company* v. *District 65*, 32 CCH Lab. Cas., ¶70,796 (Sp. Term N. Y. Co. 1957) (Resp. Br., p. 44); *In re Taurone Label Co. (Livingston)*, 39 CCH Lab. Cas., ¶66,390 (Sp. Term N. Y. Co. 1960) (Resp. Br., p. 45).

Analyzing the many cases cited by the Union in its brief, we find citations to only five lower state court decisions and three arbitration decisions as instances where the court has excused "strict compliance with the grievance machinery procedures" and allowed arbitration. Each of these cases is clearly distinguishable on its facts from the present case, which involves not a failure of "strict compliance" but a total disregard of the express and detailed terms of the contract. A discussion of only one of these cases should be sufficient to illustrate their inapplicability.

In *Livingston* v. *Tele-Ant Electronic Co.*, 4 Misc. 2d 600, 138 N.Y.S. 2d 111 (Sp. Term, N. Y. Co. 1955) (Resp. Br., p. 45), the employer sought arbitration of its claim that the union was liable to it for pecuniary damages sustained by the employer when an employee under 18 years of age, supplied by the union, was injured. The case involved District 65 and the union there sought to stay arbitration on the ground that the demand for arbitration was not timely! Under the facts of that case the court, in *dicta*, stated that the time requirement was ambiguous and that the employer had sought arbitration as expeditiously as possible under the circumstances. The actual holding of the case was that the issue involved was not arbitrable.

The other cases, all similarly distinguishable, are *Matter of Teschner*, New York Law Journal, August 4, 1954, Gold J. (Sp. Term N. Y. Co.), aff'd 285 App. Div. 435, 137 NYS 2d 901 (1st Dept. 1955), aff'd without opinion, 309 N. Y. 972 (1956) (Resp. Br., p. 42); *Matter of Greenstone*, 8 Misc. 2d 1045, 166 NYS 2d 858 (Sp. Term N. Y. Co. 1957) (Resp. Br., p. 43); *In re Pocketbook Workers Union*, 14 Misc. 2d 268, 149 NYS 2d 56 (Sp. Term N. Y. Co. 1956) (Resp. Br., p. 46); *Arsenault* v. *General Electric Co.*, 21 Conn. Supp. 98, 145 A. 2d 137 (Super. Ct. 1958), aff'd 147 Conn. 130, 157 A. 2d 918 (1960), cert. den. 364 U. S. 815 (1960) (Resp. Br., p. 44).

The District Court's finding that the Union, without justifiable excuse, completely ignored the grievance procedures set forth in the contract is amply supported by the record. Its decision should not be disturbed. Cf. *Commissioner* v. *Duberstein*, 363 U. S. 278 (1960).

Respectfully submitted,

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December 27, 1963.